

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**





# 77-2083

To be argued by  
RAYMOND L. SWEIGART

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2083

JOHN PETER GALANIS,

*Petitioner-Appellant,*

—v.—

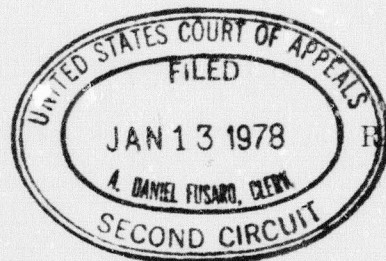
ERMEN PALLANCK, United States Marshal for the  
District of Connecticut,

*Respondent-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

### PETITION FOR REHEARING EN BANC

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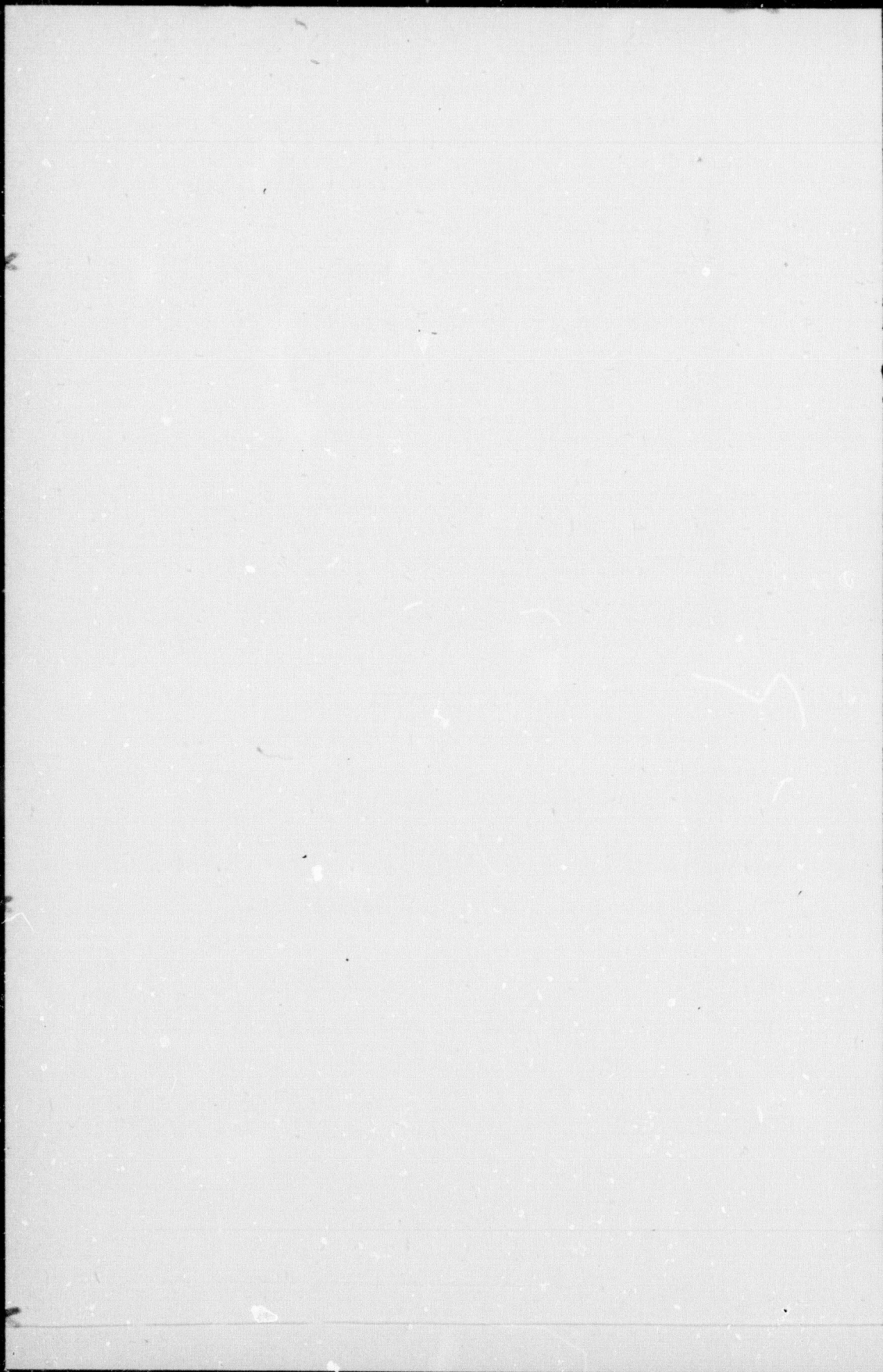
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JOHN PETER GALANIS,  
*Petitioner-Appellant,*

—v.—

ERMEN PALLANCK, United States Marshal for the  
District of Connecticut,  
*Respondent-Appellee.*

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**PETITION FOR REHEARING EN BANC**

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**Statement of the Case**

This is a petition for rehearing of a judgment of the United States Court of Appeals for the Second Circuit entered on November 22, 1977, reversing a judgment of the United States District Court for the District of Connecticut dismissing appellant's petition for habeas corpus to review an order of Jon O. Newman, Judge, sitting as an extraditing magistrate, which certified that appellant is extraditable to Canada, 429 F. Supp. 1215.

The opinion of this court is not as yet reported.

**Grounds for Rehearing**

1. Galanis has not been tried and discharged or punished in the United States for the offense for which his extradition has been requested by Canada.

2. The 1971 Treaty on Extradition between the United States and Canada is not retroactive nor is it applicable to Galanis' extradition.

## ARGUMENT

### I.

**Galanis has not been "tried and discharged or punished" in the United States for the offense for which his extradition has been requested by Canada.**

In its opinion in this matter the Court first notes that "[t]he Government does not challenge Galanis' factual assertion that he 'has been tried and discharged or punished' in the United States 'for the offense for which his extradition is requested' by Canada." This statement is apparently based upon the omission in the Government's brief, at the end of its argument that the 1971 Treaty<sup>1</sup> is not retroactive, of a further paragraph asserting that even if it is, Galanis still would not be entitled to the relief he claims.

It is respectfully submitted that this omission should not be construed as a concession which it was not intended to be. The focus of the arguments before this Court and the District Court were not on "double jeopardy" but upon the protection Galanis claimed inured to him by virtue of his plea bargain and the grant of immunity. The Treaty issue, for reasons more fully set forth below, was one which the Government frankly felt required little illucidation. Furthermore, the decision of both District

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<sup>1</sup> 1971 Treaty on Extradition Between the United States and Canada, T.I.A.S. 8237.



Judges on the law obviated any need to resolve the factual issue created by Galanis' assertion and the Government did not believe this Court could or would resolve the issue. The Government, therefore, requests this Court's reconsideration of the following arguments.

**A. Assuming Galanis' Version of the Facts to be True, He Has not Established Entitlement to Relief Under the Plain Language of the 1971 Treaty.**

The 1971 Treaty in contrast to its predecessor, the Webster-Ashburton Treaty,<sup>2</sup> contains an article which provides that:

- (1) Extradition shall not be granted in any of the following circumstances:
  - (i) when the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested state for the offense for which his extradition is requested.

If it is accepted as this Court has held that the 1971 Treaty and its provisions are available to Galanis and if the court were further to resolve all factual disputes in his favor, it does not follow that the United States has "tried and discharged or punished" Galanis for the same offense charged by Canada within the meaning of this Treaty clause; and it is this plain and specific treaty language which must be read to confer upon Galanis the right he claims.

There is no constitutional right to be free from double jeopardy resulting from extradition to the demanding country.

\* \* \* \* \*

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<sup>2</sup> 8 Stat. 572, T.S. 119, 12 Bevans 82, 26 Stat. 1508.

The Fifth Amendment right not "to be twice put in jeopardy of life or limb" is available only to prosecutions in this country. The essential elements of a plea of double jeopardy are identity of successive sovereigns and an identity of alleged offenses. [citations omitted.]

*In re Ryan*, 360 F. Supp. 270, 275 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973). Any limitation in this regard upon extradition must be a matter of consent between the Treaty signatories.

"A sovereign nation," the Supreme Court declares, "has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." "The jurisdiction of the nation within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself." And "[a]ll exception . . . to the full and complete power of a nation within its own territories must be traced to the consent of the nation itself. They can flow from no other legitimate source." [citations omitted].

*Holmes v. Laird*, 459 F.2d 1211, 1216 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 869 (1972). The exclusivity of this Treaty provision is further buttressed by this Court's holding in *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925 (2d Cir. 1974), that the Webster-Ashburton Treaty cannot be read to provide protection from extradition even where double jeopardy would have been applicable had the prosecution occurred in the United States.

Therefore, the plain language of the 1971 Treaty must be applied and Galanis must show and the record must support a finding that he has been "tried" in the United States for the "same offense" for which Canada seeks



his extradition and as a result of that proceeding been "discharged or punished."

The factual assertion made by Galanis in an attempt to meet this burden is that at the time of his guilty plea the Assistant United States Attorney in charge of his prosecution knew of his involvement with Champion in Canada and felt that at least some elements of that complicated scheme were subject to prosecution in the Southern District of New York. The prosecutor, however, decided not to charge, indict, or otherwise investigate further any element of the Champion matter, being satisfied for his purposes to insure Galanis' continued cooperation as an important Government witness to allow Galanis to plead to two other matters for which he had already been indicted and to grant him "informal transactional" immunity from prosecution by the United States for all disclosed, past criminal acts including any crime arising from Galanis' involvement with Champion Savings in Canada. This agreement was similar in nature to that discussed in *United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976).

Although it is uncontested by Galanis, that he was never charged in the United States with any crime arising out of his Champion involvement and technically never placed in jeopardy here, the indictments to which he pleaded guilty and on which he was sentenced involving entirely separate crimes, he argues nonetheless that this tangential involvement amounts to his having been "tried and discharged or punished" for the offense for which his extradition is requested by Canada within the meaning of the 1971 extradition Treaty. This rather large leap from premise to conclusion warrants further scrutiny.

The effect of this Court's decision is to significantly broaden the strict language of the Treaty to include de-



cisions by prosecutors, who may not as in this case even be aware of the consequences of their actions, that they will not "try" a defendant and will not expose him to the possibility of either "discharge" or "punishment." The plain language of the Treaty cannot be thus inverted. It supports only a conclusion that the contracting sovereigns have consented to limit their right to extradition in those cases where the requested state's *judicial* machinery has already in fact dealt with the defendant for precisely the same offense.

It is vigorously asserted that no assumption can be premised on this Treaty language that the foreign relations of two sovereign nations were to be subjugated to the totally uncontrollable practices, to the whims and vagaries, of their many and diverse prosecutorial authorities, whether federal, state, provincial, or even municipal, in the structuring of local plea bargains. The governments of both the United States and Canada are, therefore, deeply concerned at the ultimate effect this Court's decision will have not only on their relationship as governed by this Treaty, but also on the spectrum of international practice since, as this court noted in its opinion, protection against "double jeopardy" has become common to most extradition treaties.

**B. Analogous Application of this Country's Double Jeopardy Law Clearly Establishes That Galanis is Not Entitled to the Relief He Seeks.**

As discussed above, Galanis contends that his guilty pleas to two specific and totally unrelated crimes were intended, according to his plea bargain, to be in satisfaction of all crimes disclosed to the United States' authorities. He further claims that during the course of his cooperation he gave investigators information concerning his Canadian activities. On this basis, he contends that double jeopardy bars his extradition.

Conceding that this agreement or bargain at least facially provides Galanis with the protection afforded all plea agreements under *Santobello v. New York*, 404 U.S. 257 (1971), it cannot be concluded that it provides him with any protection under the concept of "double jeopardy."

Again the 1971 Treaty, the protection of which Galanis seeks, speaks in terms of strict double jeopardy and it specifically bars extradition only where the defendant "has been tried and discharged or punished" for the same "offense" for which his extradition is sought. It therefore becomes important to keep clearly in mind the distinction between the protection afforded by *Santobello* in enforcing plea agreements and that available under the concept of "double jeopardy," which has been recognized by this Court as creating entirely separate issues. *United States v. Papa*, 533 F.2d 815 (2d Cir. 1976); *United States v. Alessi*, 536 F.2d 978 (2d Cir. 1976); and *United States v. Alessi*, 544 F.2d 1139 (2d Cir. 1976). Those cases involved, as does the instant, a dispute over the terms of a plea bargain. They also involved claims of double jeopardy, which were dismissed by this Court for failure of the claimants to establish that the crimes were identical, the same in law and fact, and susceptible to proof by the same evidence. *Papa*, *supra*, at 820; *Brown v. Ohio*, 45 U.S.L.W. 4679 (June 16, 1977); *Ianelli v. United States*, 420 U.S. 770 (1975); *Blockburger v. United States*, 284 U.S. 299 (1932). The importance of this burden of proof was succinctly noted in *Alessi*, *supra*, 544 F.2d at 1152-53, n. 14, where this Court refused to "consider the legal merits of this [double jeopardy] argument since the factual predicate is lacking." Most recently in *United States v. Cumberbatch*, — F.2d —, Docket No. 77-1070 (2d Cir. September 19, 1977), this Court again chose to adhere strictly to the rule expressed in *United States v. Krauer*, 289 F.2d 909, 913 (2d Cir. 1961), where it was held:



Offenses are not the same for the purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the "same" only when "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other."

See also *United States v. Cala*, 521 F.2d 605, 607 (2d Cir. 1975).

Again passing over the factual issue thus created and unresolved, the legal significance of blurring, as Galanis would have this Court do, this important distinction cannot be overlooked. As the Government argued in the extradition proceeding and as Judge Newman noted in his opinion (App. 18-19) "a court should not lightly infer that an Assistant United States Attorney would undertake to waive on behalf of the United States the obligations imposed by an international treaty." This is particularly true here where all the parties concede that at the time of the plea agreement no protection was intended from extradition or foreign prosecution since those difficulties were not even contemplated or anticipated. (App. 12).

There can be no doubt, therefore, that the double jeopardy provisions of the Constitution cannot be interpreted as Galanis demands to provide a protection so expansive as to include decisions by prosecutors not to try, not to place a defendant in jeopardy of discharge or punishment. To do so in this context would not only provide Galanis an unanticipated windfall, but provide him protection far beyond the Fifth Amendment imperatives, beyond the authority of any prosecutor to grant, and further subject the United States in its dealings with foreign nations to uncontrollable plea bargains structured by petty prosecutorial officials.



In sum, therefore, it has been the Government's consistent position that even if the prosecutor had specifically promised Galanis as part of his plea agreement that he would not be extradited or subject to foreign prosecution for any crimes disclosed, Galanis would not be thereby protected from extradition by virtue of double jeopardy theory. His protection, if any, would be based on the completely distinct due process rationale of *Santobello v. New York*, *supra*.

**C. Galanis' Version of the Facts Does Not Establish His Entitlement to Relief Under Any Analogous Application of the Department of Justice's *Petite* Policy.**

Although the Treaty of 1971 speaks in terms of strict double jeopardy concepts, to broaden its construction and apply by analogy the Department of Justice's *Petite*<sup>3</sup> policy against dual state and federal prosecution for crimes arising out of essentially the same transaction unless there are compelling reasons for prosecution, would again create issues which the record herein does not resolve concerning the factual predicate for the claim. More importantly, however, the *Petite* policy contains a recognized exception that dual prosecutions may be undertaken without offending double jeopardy when the decision is made by the responsible Justice Department authorities that there are compelling reasons to proceed. *Rinaldi v. United States*, 46 U.S.L.W. 3304 (Nov. 4, 1977); *Bartkus v. Illinois*, 359 U.S. 121 (1957); and *Abate v. United States*, 359 U.S. 187 (1959).

The decision of the United States Department of State to honor Canada's request for extradition and the decision of the United States Department of Justice to direct

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<sup>3</sup> See *Petite v. United States*, 361 U.S. 529 (1960).

the United States Attorney for the District of Connecticut to provide assistance and representation to Canada in this extradition matter clearly fit within that exception, thus satisfying *Petite* policy.

**D. The Record Does Not Support Galanis' Conclusion That He Has Been Tried and Discharged or Punished in the United States for the Offense for Which his Extradition Has Been Requested by Canada.**

Although, as the Court notes, Mr. David Brodsky, one of the several Assistant United States Attorneys responsible for the prosecutions against Galanis, when called by Galanis to testify in his behalf at the extradition hearing, did testify that Galanis' guilty pleas were intended to cover every fraudulent transaction that Galanis had been involved with including the Champion matter, another witness, Mr. Lester Green, specifically offered contradictory testimony to the effect that the original plea agreement was made prior to Brodsky's involvement in the case with then Assistant United States Attorney Daniel Sullivan in May of 1971. Not only was this agreement made prior to Brodsky's involvement but actually prior even to Galanis' involvement in the fraudulent venture involving Champion. In fact Galanis' involvement with Champion was a specific breach of his original agreement with the Government to commit no further crimes. (Tr. 101-102).<sup>4</sup>

Mr. Green offered further testimony which sought to establish that only after the plea agreement did Galanis offer any information concerning his involvement with Champion and that information was minimal. (Tr. 104-107). The Government's case also provided proof that

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<sup>4</sup> References to the transcripts are in accordance with their pagination in the joint appendix.



the Government was not really aware of Galanis' criminal involvement in Canada until late in 1972 when Canadian authorities first approached the United States for assistance in their investigation. (Tr. 107-109). At this time the Government first questioned Galanis as to his involvement with Champion and he refused to discuss it or provide any information. (Tr. 110). The Government's proof was that the full scope and criminality of Galanis' Canadian endeavors with respect to Champion was not known to the Government until after Galanis had been sentenced in February of 1973 when the Canadian charges were filed. (Tr. 112).

This conflict between the testimony of Mr. Brodsky and Mr. Green created a very clear and specific factual issue as to whether the United States Government had even known of the Champion fraud at the time of the plea agreement, let alone had "tried" and "discharged or punished" Galanis for that fraud. In fact Mr. Brodsky's recollection was somewhat undercut by a contemporaneous letter prepared by Brodsky which stated that the Government only learned of the Champion matter "by reason of [Galanis'] statements to us after the arrangement was entered into." (App. 15).

This issue, however, was never directly decided by Judge Newman since his legal conclusion as to the inapplicability of the 1971 Treaty obviated any need to do so. It is interesting to note in this context though that on other issues Mr. Brodsky's recollection was questioned by Judge Newman while the testimony of Mr. Green was accorded substantial weight since "[o]f all the American investigators, Green appears to be the only official who has been continuously involved with Galanis from the outset of the American investigation of him through his long period of cooperation." (App. 20). Also Judge Newman accorded rather significant weight to the Brodsky letter as grounds for questioning his recollection. (App. 15).



Niether was this issue specifically resolved by Judge Zampano in the case below. Although the entire record before Judge Newman was submitted to the habeas court and the parties rested on it, there as in the extradition proceeding resolution of the issue was unnecessary because of the legal ruling as to the inapplicability of the 1971 Treaty.

Another factual issue which was not resolved below is likewise crucial to Galanis' claim to relief. The "double jeopardy" clause of the 1971 Treaty requires that Galanis have been "tried" and then as a result of that trial "discharged" or "punished" for the "same offense" for which his extradition to Canada is sought. It is again useful to recall, as this Court notes in its opinion that the indictments to which Galanis pleaded guilty and on which he received sentences of six months imprisonment and five years probation did not involve the Champion fraud. Further, as the record reflects, Galanis was not indicted or charged in any way by the United States as a result of his Champion involvement. The record does not establish what crime if any Galanis might have been charged with in the United States arising out of his fraudulent activities in Canada. As this Court recently reaffirmed in *United States v. Papa, supra*, 533 F.2d at 820 to be successful in a double jeopardy defense a claimant must establish that the crimes are identical, the same in law and fact, and susceptible to proof by the same evidence. The importance of the claimant's burden was noted in *United States v. Alessi, supra*, 544 F.2d at 1152-53 n. 14.

Applying these double jeopardy principles to this case, the record clearly discloses Galanis' failure in this regard. The crime of fraud charged in Canada is quite specific, and the evidence adduced at the extradition hearing in the words of Judge Newman was "ample." (App. 41-46) It is interesting to note that at the extradition hearing

Galanis argued that this evidence failed to establish a crime in Canada, establishing only a crime in Switzerland. (App. 43-44). It is also crucial to note that what the record totally fails to provide is any evidence that a crime was committed in the United States which was the same in law and fact as the one committed in Canada or that it is susceptible of proof by identical evidence. Galanis' claim of double jeopardy is, therefore, based upon a purely conjectural crime within the jurisdiction of the United States. Clearly the Court must require more than this before granting him a discharge.

The Government respectfully submits that based upon this record the factual issue of whether or not Galanis has been tried by the United States for the Champion fraud and discharged or punished for it cannot be determined in Galanis' favor on appeal.

**E. The Facts Which were Determined By Judge Newman Reveal that Galanis Cannot Even Establish Entitlement to Protection From Extradition Under *Santobello*.**

As noted above, and as was the focus of this case prior to this Court's decision, the main thrust of Galanis' claims have been that he is protected from extradition by the terms of his plea agreement and the grant of immunity. Thus Galanis has attempted to align his cause with that of the petitioner in *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975); on remand *Petition of Geisser*, 414 F. Supp. 49 (S.D. Fla. 1976); *vacated and remanded*, 544 F.2d 698 (5th Cir. 1977), where the prosecutors had apparently made a specific promise as part of a plea bargain that the Department of Justice would use its best efforts to prevent the petitioner's extradition.

Galanis, of course, obtained no such promise, and in this context it is important to review exactly what



Galanis' final agreement with the United States included. Judge Newman found that the consideration which Galanis bargained for and received in exchange for his guilty pleas and cooperation was immunity from United States prosecution for crimes concerning any matters which he discussed with the American authorities, and a Government promise to insure that any information thus obtained would not be used against him in any proceeding, including extradition. (App. 18).

Thus the inquiry below became whether the United States breached this agreement, and Galanis' factual assertion that it had was specifically rejected.

Therefore, what Galanis has succeeded in doing after receiving everything he bargained for from the United States is to stretch that agreement to provide him with protection not even he originally intended. Such a feat is surely akin to that at once applauded and condemned by this Court in *Shapiro v. Ferrandina*, 478 F.2d 884, 904 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973) as quite ingenious but savoring of technicality and peculiarly inappropriate in dealings which affect this nation's relationship with foreign sovereigns.

Upon this record it is difficult to ascertain how Mr. Galanis can now claim in this Court that by the fortuitous circumstance of his having divulged some information to the United States authorities concerning his nefarious activities in Canada he is now shielded by a Treaty clause designed to protect those whose extradition is sought from "double jeopardy." The real issue is whether an informal immunity agreement which effectively bars prosecution by the United States under *Santobello* and specifically contains no provision barring extradition or foreign prosecution but to the contrary only a promise that no testimony or information given by Galanis would be used against him in an extradition proceeding can be found



to bar Galanis' extradition and the Canadian prosecution through the fortuitous *ex post facto* application of the "double jeopardy" provision of the 1971 Treaty.

The Government respectfully contends that the only conclusion which can be reached is that Galanis has established no entitlement to relief under the plain language of the 1971 Treaty, under any theory of strict double jeopardy; he has established no entitlement to any relief under any broader theory of fairness or efficient and orderly law enforcement such as the Department of Justice's *Petite* policy and he has conceded that his actual plea agreement provides no protection from extradition or foreign prosecution. To now provide Galanis with protection from extradition despite this situation would be stretching the language of the 1971 Treaty far beyond its plain meaning and its obvious intention.

## II.

### **The 1971 Treaty on Extradition Between the United States and Canada is not retroactive.**

This Court's decision decision construing the "double jeopardy" provisions of the 1971 Treaty as retroactive is also of great concern to the governments of both the United States and Canada. This Court's attention is drawn to the effect this decision will have both on our domestic law and its effect on international law and the relations between these two sovereigns.

In drafting the 1971 Treaty, the parties chose to specifically provide:

This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; *except that the crimes listed*

*in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.* [emphasis supplied.]

Both of the contracting parties to this Treaty have in numerous cases strictly construed the "except" clause in accordance with its plain meaning as precluding retroactivity in all respects and have treated all requests for extradition for crimes committed prior to entry into force of the new Treaty as subject to extradition under the provisions of the Webster-Ashburton Treaty and the amendatory conventions thereto; and there are at this time several extradition cases pending before the Courts of both countries which are proceeding under the terms of the old treaty.

The importance of the intentions and practices of the contracting parties with respect to the applicability and construction of Treaty provisions has been recognized by this Court as a touchstone governing its decisions. In *Day v. Trans-World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), the Court noted that:

Those called upon to construe a treaty should in the words of Judge Clark, strive to "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd* 373 U.S. 419 (1963).

The conduct of the parties subsequent to ratification of a treaty and their practices thereunder are, therefore, relevant in ascertaining the proper construction to accord the treaty's various provisions. See *Pigeon River Improvement Slide and Boom Company v. Cox*, 291 U.S. 138 (1934); *Husserl v. Swiss Air Transport Company*, 351



F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (per curiam); Harvard Research, Article 19; M. McDougal, H. Lasswell and J. Miller, *The Interpretation of Agreements and World Public Order* 56, 58 (1967); II, C. Hyde, *International Law* 72 (1922); Vienna Convention Art. 31 (3). In this context this Court found especially relevant Professor Hyde's statement that:

A court might even feel obliged to sustain [the parties' later] construction of a treaty differing widely from that which it was in fact possible to prove to have been the design of the parties at the time when the agreement was concluded.

II Hyde, *supra*, at 72. It must be remembered that the Court should refrain from imposing its own values upon the parties. The Court's obligation is to respect and implement the goals and intentions of the parties. *Day, supra*, 528 F.2d at 36, n. 13.

In the instant case the language of the Treaty provision in question is very straightforward. As this Court noted at page 508 of its slip opinion the construction applied by the Governments of Canada and the United States is "permissible" and "perhaps would adhere more closely to the letter of the 'except' clause than that urged by Galanis." Therefore, when the construction and practice of the contracting parties is in accordance with the plain language of the Treaty and "permissible," this Court's choice of a differing construction would appear to run contrary to the advice of the World Court in its opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*, I.C.J. Reports, 1950, p. 8:

The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to



endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.

Furthermore, even if the Treaty provision could be considered as arguably ambiguous the World Court has declared:

If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty.

*Competence of the I.L.O. to Regulate Agricultural Labor*, P.C.I.J. (1922) Series B, No. 2 p. 39.

The record below clearly shows that the Governments of Canada and the United States do not consider the Treaty provisions to be retroactive. The Government of Canada has requested and continues to press for the extradition of Galanis under the provisions of the Webster-Ashburton Treaty. The Government of the United States has concurred in that request and undertaken to honor it in accordance with its Treaty obligations.

Nothing in the record establishes anything to the contrary. This Court, however, characterized the very clear statement of Acting Secretary of State, Robert S. Ingersoll that "[t]he Treaty is not retroactive in effect" as inconclusive, and further discredited the affidavit of K. E. Malmberg who was the chief negotiator of the 1971 Treaty on behalf of the United States, as merely conclusory when he advised that the Governments' intentions were that the "double jeopardy" provision is not retroactive.

It is respectfully concluded that this approach to Treaty construction is not in accordance with domestic or international law in this regard. The language of the Treaty is plain. The construction applied to that language by the contracting parties is permissible, and their intent and practice thereunder is clear. The Treaty was not intended to be retroactive, and this Court should feel constrained to give effect to that intention.

### CONCLUSION

For all the foregoing reasons, the Government submits that both as a matter of law and a matter of fact Galanis has failed to establish within the meaning of the 1971 Treaty that he has been tried and discharged or punished by the United States for the same offense for which Canada seeks his extradition.

Furthermore, the Government submits that the decision of the District Court that the 1971 Treaty is not retroactive or applicable to Galanis' extradition was not in error.

Respectfully submitted,

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**AFFIDAVIT OF PERSONAL SERVICE**

U.S. Court of Appeals  
DOCKET # 77-2083

JOHN PETER GALANIS,  
PETITIONER-APPELLANT

vs.

ERLEN PALLANCK, US MARSHAL,  
RESPONDENT-APPELLEE

Albert Sensale, being duly sworn, deposes and says, that deponent

is not a party to the action, is over 18 years of age, is an employee of the Alpert Press, Inc.,  
644 Pacific Street, Brooklyn, N. Y. 11217 and resides at 914 Brooklyn Avenue,

Brooklyn, New York

That on the 13th day of January, 1978

deponent served the within Brief

upon John S. Martin, Jr., 1290 Avenue of the Americas, New York, N. Y. 10019; and,  
Paul R. Grand, Esq., 375 Park Avenue, New York, New York 10022

attorney(s) for the Petitioner-Appellant in the action, by delivering a true copy thereof  
to him/her personally.

*Albert Sensale*

Sworn to before me,

This 13th day of January, 19 78.

PATRICIA D. O'HARA, Notary Public  
State of New York, No. 31-4654787  
Qualified in New York County  
Cert. Filed in Kings County  
Commission Expires March 30, 1979

*Patricia D. O'Hara*